

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2002-011

December 16, 2002

ALBERTA SUSTAINABLE RESOURCE DEVELOPMENT

Review Numbers 2205, 2207, 2235 and 2366

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant applied to Alberta Sustainable Resource Development (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”), seeking access to any records that reflected what happened to the original “allocations” transferred from the estate of the Applicant’s father (who operated an outfitting company) to a named individual in 1994. An “allocation” allows an “outfitter-guide” to take one hunter to a particular area (Wildlife Management Unit) to hunt for a specified species in a specified manner. The Adjudicator agreed with the Public Body that the information about allocations was information about a licence, permit or other similar discretionary benefit concerning a commercial activity, and that a public body had granted the licence, permit or other similar discretionary benefit to the Third Parties. Therefore, disclosure of the Third Parties’ names and information about the nature of the licence, permit or other similar discretionary benefit was not an unreasonable invasion of the Third Parties’ personal privacy, as provided by section 17(2)(g) of the FOIP Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n) [previously section 1(1)(n)], 1(p) [previously section 1(1)(p)], 4(1) [number unchanged by R.S.A. 2000, c. F-25], 16 [previously section 15], 16(1) [previously section 15(1)], 16(1)(a) [previously section 15(1)(a)], 16(1)(b) [previously section 15(1)(b)], 16(1)(c) [previously section 15(1)(c)], 16(3)(b) [previously section 15(3)(b)], 17 [previously section 16], 17(2) [previously section 16(2)], 17(2)(g) [previously section 16(2)(g)], 17(2)(g)(i) [previously section 16(2)(g)(i)], 31 [previously section 30], 71(3)(b) [previously section 67(3)(b)], 72 [previously section 68]; *Wildlife Act*, R.S.A. 2000, c. W-10, ss. 1(n), 7(1), 13(1), 13(2), 104(1)(b); *Wildlife Regulation*,

Alta. Reg. 143/97, ss. 3(b), 24(3), 52, 53(1), 54, 54(2), 54(4), 55, 55(2), 55(3), 58, 59; Schedule 3, ss. 2(1), 2(2), 2(2)(a)-(g), 2.1(1), 2.1(3)(a), 2.1(3)(b), 2.1(5), 3(1), 6, 10(d), 11, 12; Schedule 8, Part 5, s. 5.

Orders Cited: AB: Orders 96-019, 97-020, 98-014, 98-018, 2000-014.

I. BACKGROUND

[para 1] On March 13, 2001, the Applicant applied to Alberta Sustainable Resource Development (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”), seeking access to any records that reflected what happened to the original “allocations” transferred from the estate of the Applicant’s father (who operated an outfitting company) to a named individual in 1994. The Public Body says that an “allocation” allows an “outfitter-guide” to take one hunter to a particular area (Wildlife Management Unit or “WMU”) to hunt for a specified species in a specified manner.

[para 2] The Applicant also posed a series of questions to the Public Body concerning certain allocations. The Applicant wanted to know:

- To whom were certain allocations transferred?
- What was the price when transferred?
- What is the price now?
- What year were certain other allocations returned to the Government?
- Have those allocations been resold?
- What happened to a further number of allocations?
- Which of those allocations were returned to the Government?
- Which of those allocations have been resold?
- For what price?

[para 3] The Public Body located records that contained responsive information possibly affecting third parties, whom the Public Body notified. Three third parties (the “Third Parties”) objected to disclosure of what they believed was their information, and requested reviews by this Office.

[para 4] Mediation was authorized, but was not successful. As the three Third Parties knew the identities of each other, the matters proceeded to a combined written inquiry. The Third Parties were given affected party status in each other’s inquiry. The Applicant was given affected party status for the combined inquiry.

[para 5] After this Office issued a Notice of Inquiry, the Public Body found additional responsive records within the Alberta Professional Outfitters Society (“APOS”). The inquiry was postponed to allow the Public Body to consider the status of APOS and to allow the Public Body the opportunity to give notice to third parties concerning the additional records.

[para 6] Only one third party objected to disclosure of the additional records. That third party was one of the Third Parties who had already requested a review. The third party's new request for review (Review Number 2366) was added to the combined inquiry.

[para 7] This Office then issued a revised Notice of Inquiry to all the parties. APOS was given affected party status for the combined inquiry, as all the reviews contained records relating to APOS.

[para 8] The Public Body and the Applicant provided initial and rebuttal written submissions for the combined inquiry. The Third Parties did not provide written submissions addressing the issues for the combined inquiry. However, the Public Body provided me with the comments it received from the Third Parties prior to the Public Body's giving notice under section 31 [previously section 30] of the FOIP Act of its intention to disclose certain information.

[para 9] APOS also did not provide a written submission. However, the Public Body's initial written submission contained an affidavit (the "affidavit") setting out evidence of an administrative manager employed by APOS.

[para 10] The Public Body subsequently sought and received my permission to provide further information to the Applicant about the reasons for the Public Body's severing personal information from certain records.

[para 11] On January 1, 2002, the revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, came into force. Most of the section numbers of the FOIP Act changed, but not the substance of the sections. In this Order, the previous section numbers appear in square brackets after the new section numbers.

II. RECORDS AT ISSUE

[para 12] The records at issue consist of numerous records located within the Public Body and APOS. The Public Body separated those records according to this Office's review numbers, then numbered the records consecutively within each review number. In this Order, I will refer to the records according to the Public Body's numbering system.

[para 13] In general, the records fall into the following categories:

- allocation summaries for various years
- applications for transfers of allocations
- individual allocation listings
- renewal statements for outfitters/guides
- used allocation listings by outfitter/guide names

- confirmation of allocation lease agreements
- held allocations by outfitter/guide
- leased allocations by outfitter/guide
- transferred allocations by/to outfitter/guide
- transferred allocations by/from outfitter/guide

III. ISSUES

[para 14] There are four issues in this inquiry:

- A. Does the Public Body have custody or control of the records held by APOS?
- B. Does section 17(2)(g) [previously section 16(2)(g)] of the FOIP Act (licence, permit or other similar discretionary benefit) apply to the information or records?
- C. If section 17(2)(g) [previously section 16(2)(g)] does not apply to the information or records, does section 17 [previously section 16] of the FOIP Act (personal information) apply to the information or records?
- D. Does section 16 [previously section 15] of the FOIP Act (business interests) apply to the information or records?

IV. DISCUSSION OF THE ISSUES

Preliminary matter

[para 15] The Public Body said it removed from the records the information that was not responsive to the access request (paragraph 30 of the Public Body’s main submission). That non-responsive information was the information the Public Body had earlier withheld under section 17 [previously section 16].

[para 16] “Responsive” information or records is that information or those records that reasonably relate to an applicant’s access request: see Order 97-020. Responsiveness of information or records was never an issue for the inquiry. However, neither the Applicant nor the Third Parties objected to the removal of non-responsive information.

[para 17] Order 97-020 supports the Public Body’s authority to remove from records any information that is not responsive to the Applicant’s access request. However, I will review the Public Body’s decision.

[para 18] The Public Body acknowledges that the Applicant’s questions to the Public Body are only a subset of the larger access request (paragraph 28 of the Public Body’s main submission). For the most part, it appears that the Public Body has taken a

broad rather than a narrow view of what is responsive information, as Order 97-020 requires.

[para 19] Except for the information set out in Appendix B to this Order, I find that the Public Body properly removed from the records the information the Public Body highlighted as being non-responsive. That non-responsive information is information about allocations unrelated to the Applicant's access request or information to which the Applicant did not request access. The Public Body has the authority to remove that non-responsive information from the records. I have not considered that information under section 16 [previously section 15] or section 17 [previously section 16].

[para 20] I find that the information set out in Appendix A to this Order is also non-responsive because it is information to which the Applicant did not request access. The Public Body has the authority to remove that non-responsive information from the records. I have not considered that information under section 16 [previously section 15] or section 17 [previously section 16].

[para 21] I find that the information set out in Appendix B to this Order, which is information the Public Body said is non-responsive, is in fact responsive to the Applicant's access request. The Public Body does not have the authority to remove that responsive information from the records. I intend to consider that information under section 16 [previously section 15] and section 17 [previously section 16].

[para 22] Along with this Order, I will provide the Public Body with a copy of the records, highlighting the non-responsive information set out in Appendix A and the responsive information set out in Appendix B.

ISSUE A: Does the Public Body have custody or control of the records held by APOS?

[para 23] Review Number 2366 contains the records that the Public Body subsequently found within APOS.

[para 24] Section 4(1) [number unchanged by R.S.A. 2000, c. F-25] of the FOIP Act provides that the FOIP Act applies to records in the custody or under the control of a "public body", as defined in section 1(p) [previously section 1(1)(p)]. APOS is not a "public body", as defined. Consequently, for the FOIP Act to apply to the records held by APOS, those records must be in the custody or under the control of a public body.

[para 25] Section 104(1)(b) of the *Wildlife Act*, R.S.A. 2000, c. W-10, provides for delegation of the Minister's powers, duties and functions, as follows:

104(1) The Lieutenant Governor in Council may make regulations

...

(b) respecting the establishment of delegated authorities and the delegation to one or more delegated authorities of the performance of any of the Minister's duties or functions or the exercise of any of the Minister's powers under this Act, other than the power to make regulations and to subdelegate and, notwithstanding the foregoing, making any provision with respect to any such delegation that is made with respect to the Department of Labour in Schedule 10 to the Government Organization Act or that may be made by regulations under section 2 of that Schedule; ...

[para 26] Section 2(1) of Schedule 3 of the *Wildlife Regulation*, Alta Reg. 143/97, establishes APOS as a delegated authority, as follows:

2(1) The Alberta Professional Outfitters Society is continued as a delegated authority referred to in section 104(1)(b) of the Act.

[para 27] The powers, duties and functions delegated to APOS are set out in section 2(2) of Schedule 3 of the *Wildlife Regulation*, which reads:

2(2) The Society [APOS] is delegated the following powers, duties and functions, to be carried out in accordance with the Act, this Regulation and the objects and by-laws of the Society:

- (a) the issue of outfitter-guide permits and guides' designations;*
- (b) the distribution, including transfers, of allocations;*
- (c) the issue of non-resident alien licences authorizing the hunting of big game animals;*
- (d) the collection of fees for licences, permits and guides' designations;*
- (e) the designation of, and the setting of the qualifications for, guides;*
- (f) the cancellation and suspension of licences, permits and guides' designations, issued by the Society;*
- (g) establishment of the kinds of protection of deposits required by section 57(2) of this Regulation.*

[para 28] The records provided for Review Number 2366 pertain to those powers, duties and functions delegated to APOS, particularly as set out in section 2(2)(b) of Schedule 3 of the *Wildlife Regulation*. The Public Body says that those powers, duties and functions were delegated to APOS in 1997.

[para 29] Section 2.1(5) of Schedule 3 of the *Wildlife Regulation* provides that all information and records created or maintained in the course of carrying out the powers, duties and functions under the *Wildlife Regulation* become and remain the property of the Crown in right of Alberta.

[para 30] Consequently, the records provided for Review Number 2366 that are held by APOS do not belong to APOS. The Crown owns those records. As there is statutory control of those records in the Crown, as represented by the Minister of the Public Body who is the head of the Public Body, I find that those records are under the control of the Public Body. Therefore, the FOIP Act applies to those records.

[para 31] If an access request is made directly to APOS under the FOIP Act, section 2.1(3)(a) of Schedule 3 of the *Wildlife Regulation* requires APOS to direct that access request to the Public Body. If an access request is made to the Public Body, section 2.1(3)(b) of Schedule 3 of the *Wildlife Regulation* requires APOS to comply with such directions regarding the request as may be provided by the Public Body. It appears that the latter procedure was followed in this case.

ISSUE B: Does section 17(2)(g) [previously section 16(2)(g)] of the FOIP Act (licence, permit or other similar discretionary benefit) apply to the information or records?

[para 32] The relevant part of section 17(2)(g) [previously section 16(2)(g)] reads:

17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(g) the information is about a licence, permit or other similar discretionary benefit relating to

(i) a commercial or professional activity, that has been granted to the third party by a public body...

...

and the disclosure is limited to the name of the third party and the nature of the licence, permit or other similar discretionary benefit...

[para 33] If section 17(2)(g) [previously section 16(2)(g)] applies, then disclosure of the name of the third party and the nature of the licence, permit or other similar discretionary benefit is not an unreasonable invasion of the third party's personal privacy.

[para 34] Section 17(2) [previously section 16(2)] refers to "personal information". That term is defined in section 1(n) [previously section 1(1)(n)] to mean recorded information about an identifiable "individual".

[para 35] The Commissioner previously held that “individual” encompasses only a single human being, and does not include a corporation or any entity other than a single human being: see Order 96-019. Therefore, the reference to the name of a third party in section 17(2)(g) [previously section 16(2)(g)] can mean only the name of an individual. A name that is not the name of an individual does not fall within section 17(2)(g) [previously section 16(2)(g)] and indeed not within section 17 [previously section 16] either.

[para 36] Some of the names in the records are individuals’ names contained in a business name that is not a corporate name. In any other case, I would have to decide whether those business names are “personal information”. In this case, I do not have to decide because section 17(2)(g) [previously section 16(2)(g)] provides that the disclosure of the name in any event is not an unreasonable invasion of a third party’s personal privacy.

[para 37] In Order 98-014 and Order 98-018, the Commissioner considered the predecessor to section 17(2)(g) [previously section 16(2)(g)]. However, as section 17(2)(g) [previously section 16(2)(g)] has since been amended substantially, I find it necessary to reconsider the section.

[para 38] For section 17(2)(g) [previously section 16(2)(g)] to apply, the following criteria must be met:

1. The information must be about a licence, permit or other similar discretionary benefit relating to a commercial or professional activity.
2. A public body must have granted the licence, permit or other similar discretionary benefit to a third party.

[para 39] If the foregoing criteria are met, the disclosure must be limited to the name of the third party and the nature of the licence, permit or other similar discretionary benefit. The disclosure of the name and the nature of the licence, permit or other similar discretionary benefit is not an unreasonable invasion of a third party’s personal privacy.

1. Is the information about a licence, permit or other similar discretionary benefit relating to a commercial or professional activity?

a. “Licence, permit or other similar discretionary benefit”

[para 40] The information in the records is about “allocations” held by various third parties, including the Third Parties in this inquiry.

[para 41] The notion of “allocation” first appears in section 13(1) of the *Wildlife Act*, which reads:

13(1) Except as prescribed, the Minister may issue a licence or permit to an applicant and may

(a) determine the number of licences or permits to be issued, and

(b) where the number of licences or permits is to be limited, establish the manner in which they are to be allocated.

[para 42] Section 3(b) of the *Wildlife Regulation* defines “allocation” as follows:

3 In this Regulation,

...

(b) “allocation” means a permit consisting of an allocation referred to in section 54(2), and “allocated licence” means an applicable licence within the meaning of section 54(1) issued under such an allocation;...

[para 43] Section 54 of the *Wildlife Regulation* reads:

54(1) In this section, “applicable licences” means non-resident and non-resident alien licences of a particular class or type authorizing the hunting of big game, wolf or coyote, whether generally or in a particular area.

(2) If the number of applicable licences to be issued in any one fiscal year is to be limited, the Minister may issue a permit, known as an allocation, that allocates the applicable licences under a process established by the Minister that involves

(a) applications to the Minister,

(b) tenders or bids, or

(c) any other procedure or combination of procedures decided by the Minister.

(3) The Minister may impose terms and conditions with respect to any process established under subsection (2).

(4) The Minister may issue an allocation only to an outfitter-guide and a non-resident/non-resident alien trophy sheep special licence allocation only to a class S outfitter-guide (big game).

[para 44] “Non-resident” and “non-resident alien” are defined in the *Wildlife Regulation*. However, in general, “non-resident” means Canadian and “non-resident alien” means non-Canadian.

[para 45] “Outfitter-guide” is also defined the *Wildlife Regulation*. However, the following paragraph in the Public Body’s main submission is a more helpful description of outfitting and guiding:

20. A guide is a person who assists another person to hunt (s. 1(n) of the *Wildlife Act*). A guide requires a designation or past licence to conduct this activity (s. 52 of the *Wildlife Regulation*). An outfitter is a guide who, by way of obtaining a permit (with a unique identification number), is allowed to enter into a contract for the provision of guiding services to certain types of hunters. An outfitter is permitted to apply for and obtain, on a hunter’s behalf, a licence authorizing hunting (s. 58 of the *Wildlife Regulation*). In order to provide a hunter with a guiding service, an outfitter must possess an “allocated” licence (“allocation”). The allocation is valid for the specified Wildlife Management Unit (“area”), animal species, and manner (“class”) of hunting.

[para 46] Paragraphs 2 and 3 of the affidavit say:

2. The hunting licence allocation process, which was initiated in 1990, sets aside a certain percentage of the available licences for the purposes of guided hunters, as opposed to recreational hunters. This process was initiated in 1990. An allocation permits an outfitter-guide to take one hunter to a particular area to hunt for a specific species in a specified manner.

3. An allocation is “used” when an outfitter obtains a hunting licence on behalf of a non-resident (Canadian) or non-resident alien (non-Canadian) hunter. At that time, the outfitter must specify which allocations they intend to use in guiding that particular hunter. The “use” of an allocation is not linked to actual hunting in that area, nor to an actual kill.

[para 47] It is evident from sections 58 and 59 of the *Wildlife Regulation* that an outfitter-guide can guide a person to hunt only under an allocated licence.

[para 48] I find that an allocation is a permit that gives an outfitter-guide the right to purchase a hunting licence for a non-resident (Canadian) or non-resident alien (non-Canadian). Exhibit A to the affidavit describes an allocation similarly. An allocation is specific to the WMU/area, species of animal, and manner (“class”) of hunting. According to Exhibit A to the affidavit, the Public Body determines the number of allocations for each species of big game for each WMU.

[para 49] In Order 98-018, the Commissioner said that the words “other similar [my emphasis] discretionary benefit” imply that a licence or permit must also have the characteristics of being a “discretionary benefit”.

[para 50] The *Wildlife Act* and the *Wildlife Regulation* regulate the management of wildlife in Alberta. Section 7(1) of the *Wildlife Act* provides that wildlife in Alberta belongs to the Crown. As the Crown owns the wildlife, I conclude that an allocation is a

“benefit” because it allows only an outfitter-guide to obtain a hunting licence and use that licence to enter into a contract to take a non-resident or non-resident alien to hunt wildlife that the outfitter-guide does not own.

[para 51] Furthermore, issuing the allocation is a discretionary (“may”) decision of the Minister, because the Minister can decide whether or not to grant the allocation. Therefore, an allocation is a permit that has the characteristics of being a discretionary benefit.

[para 52] The allocations at issue are those originally granted to the Applicant’s father’s outfitting company. However, the information in the records is also about the transfers, including leases, of those allocations. The estate of the Applicant’s father transferred the allocations to one of the Third Parties, who subsequently transferred or leased the allocations to other third parties, and so on.

[para 53] Section 55(2) and section 55(3) of the *Wildlife Regulation* authorize the transfer of an allocation, as follows:

55(2) An outfitter-guide (big game) may transfer all or any of his allocations that are not of the non-resident/non-resident alien trophy sheep special licences to another outfitter-guide (big game) specified by the outfitter-guide, if the Minister approves the transfer.

(3) On the death of an individual holder or the liquidation or winding-up of a corporate holder of an allocation, the allocation may be transferred to a person who is eligible under section 54(4) to be issued it if the Minister approves the transfer in writing.

[para 54] Paragraph 11 of the affidavit says that, since 1997, the ability to enter into a lease arrangement has also been available to outfitters. A lease document must be submitted, which allows an outfitter to temporarily hold and use an allocation of another outfitter for one season. The “Confirmation of Allocation Lease Agreement” for each year says:

This document confirms permission for the outfitter-guide named above to purchase [year] non-resident/non-resident alien hunting licences with the allocations I have listed here.

[para 55] It appears that a lease is a temporary transfer of an allocation.

[para 56] A transfer, including a lease, of an allocation is not a licence or permit, as defined in the *Wildlife Act* and *Wildlife Regulation*. Does a transfer, including a lease, of an allocation fall within “other similar discretionary benefit” under section 17(2)(g) [previously section 16(2)(g)]?

[para 57] In my view, a transfer of an allocation is a benefit to the transferee third party outfitter-guide, who then has the right to purchase a non-resident or non-resident alien hunting licence. The transferee can then enter into a contract to take a non-resident or non-resident alien to hunt wildlife that the transferee does not own.

[para 58] The transfer of an allocation is also a benefit to the transferor third party outfitter-guide, who can charge the transferee a fee for leasing the allocation.

[para 59] Approving the transfer is a discretionary (“may”) decision of the Minister, because the Minister can decide whether or not to approve the transfer. Therefore, I find that a transfer, including a lease, of an allocation is a discretionary benefit.

b. “Commercial or professional activity”

[para 60] In numerous Orders, the Commissioner has said that “commercial information” relates to the buying, selling or exchange of merchandise or services. I interpret “commercial activity” as any activity that relates to the buying, selling or exchange of merchandise or services. Consequently, section 17(2)(g) does not encompass a solely recreational activity.

[para 61] A permit (allocation) relates to outfitting-guiding, as set out in section 54(4) of the *Wildlife Regulation*. Section 53(1) of the *Wildlife Regulation* authorizes guiding for gain or reward. Therefore, I find that outfitting-guiding is a commercial activity since it relates to the buying or selling of services. Consequently, the information in the records is about a licence, permit or other similar discretionary benefit relating to a commercial activity.

[para 62] Having made this decision, I do not find it necessary to consider whether the permit (allocation) also relates to a professional activity.

2. Did a “public body” grant the licence, permit or other similar discretionary benefit to a third party?

[para 63] The issue is whether APOS’s granting the licence, permit or other similar discretionary benefit falls with a “public body’s” granting the licence, permit or other similar discretionary benefit.

[para 64] According to the Public Body, outfitting and guiding have been regulated since 1990. Until 1997, outfitter allocations were administered by predecessors to the Public Body. The Public Body says that a predecessor to the Public Body granted allocations. Consequently, I find that, prior to 1997, a “public body” granted the licence, permit or other similar discretionary benefit.

[para 65] From 1997 on, the allocations have been administered by APOS (paragraph 22 of the Public Body’s main submission). APOS granted the licence, permit or other similar discretionary benefit.

[para 66] I have found that the Lieutenant Governor in Council delegated the Minister's powers, duties and functions concerning allocations (among other things) to APOS. Since that time, the Minister's powers, duties and functions have been performed by APOS as delegate.

[para 67] In Order 98-018, the Commissioner found that the minister of the public body, through the minister's delegate, granted the licence in question, for the purposes of section 17(2)(g) [previously section 16(2)(g)].

[para 68] I believe the Commissioner recognized in Order 98-018 that a minister's function as head of a public body could be delegated, but the minister's function being performed by the delegate (such as granting the licence, permit or other similar discretionary benefit) would still fall within a "public body's" granting the licence, permit or other similar discretionary benefit because the minister dictates what the delegate can do. A similar rationale applies in this case.

[para 69] Besides retaining control of the records held by APOS and access to those records, the Minister retains control over APOS in other ways while APOS is performing the Minister's powers, duties and functions. For example, Schedule 3 of the *Wildlife Regulation* provides that APOS must provide the Minister with (i) a yearly business plan and an annual report (section 3(1)); (ii) returns and information as the Minister requires, outlining the services performed under section 2(2) (section 6); and (iii) notification of any proposed changes to its objects or bylaws (section 11). Furthermore, section 2.1(1) of Schedule 3 of the *Wildlife Regulation* requires APOS to comply with the FOIP Act in carrying out its powers, duties and functions under the *Wildlife Regulation*, just as the Minister would be required to comply with the FOIP Act if the Minister were performing those powers, duties or functions.

[para 70] The functions being performed by APOS as delegate are still the Minister's functions. This is clearly laid out in the *Wildlife Act* and *Wildlife Regulation*. The Minister of the Public Body retains control of APOS as delegate. Therefore, I have no difficulty finding that APOS's granting the licence, permit or other similar discretionary benefit falls within a "public body's" granting the licence, permit or other similar discretionary benefit for the purposes of section 17(2)(g) [previously section 16(2)(g)].

3. What does "nature of" the licence, permit or other similar discretionary benefit mean?

[para 71] The Concise Oxford Dictionary, Ninth Edition, says that "nature" means "a thing's or person's innate or essential qualities or character". The innate qualities of something can mean its substance.

[para 72] Allocations are a part of what the Public Body says is the management of a public resource, namely, wildlife. The Public Body manages wildlife according to the

Wildlife Act and the *Wildlife Regulation*, which set out a comprehensive licencing/permit scheme or program to accomplish that purpose.

[para 73] An allocation (including the transfer of an allocation) is a creature of statute. The entire allocation process is formal and regulated. Therefore, the “nature of” an allocation can be determined to a great extent by looking at the rules for administering and regulating the allocation. Most, but not all, of those rules are set out in the *Wildlife Act* and the *Wildlife Regulation*. Those rules will assist in determining the “nature of” the allocation. I will review those rules under the following headings:

- a. What is an allocation all about and how many are there?
- b. How do you get and keep an allocation?
- c. What do you pay for an allocation?

a. What is an allocation all about and how many are there?

[para 74] As previously discussed, an allocation is a permit that gives an outfitter-guide the right to purchase a hunting licence for a non-resident (Canadian) or non-resident alien (non-Canadian). Each allocation is given an allocation identification number. An allocation is specific to the WMU/area, species of animal, and manner (“class”) of hunting.

[para 75] On page 11 of its main submission, the Public Body says that the allocation identification number, WMU/area, species and class is specific to the allocation and remains the same, regardless of which outfitter holds the allocation. I find that the allocation identification number, WMU/area, species and class are information about the “nature of” the allocation.

[para 76] Some of the WMU numbers changed when WMU boundaries changed. When there was a boundary change, the predecessor to the Public Body or APOS “exchanged” the previous WMU number for a new WMU number. My decision about the information in the previous paragraph is not affected by the “exchanges” of those WMU numbers. I find that the “exchange” information is also information about the “nature of” the allocation. This information sometimes appears under the “Source” category in the records.

[para 77] The Public Body determines how many allocations there will be for each species of big game for each WMU (paragraph 7 of the affidavit and Exhibit A to the affidavit). There are a limited number of allocations. On page 11 of its main submission, the Public Body says that the number of allocations held in an area is specific to the allocation and remains the same, regardless of which outfitter holds the allocation.

[para 78] I find that information about which allocations any one person holds in a WMU and how many of the limited number of allocations any one person holds is also information about the “nature of” the allocations. The predecessor to the Public Body and now APOS keeps and publishes the lists of who holds which allocations (paragraph

15 of the affidavit). This information sometimes appears also in the “Current Status” lists in the records.

[para 79] Each allocation has a starting season. I find that is also information about the “nature of” the allocation.

[para 80] In summary, the following is information about what an allocation is all about and how many there are. It is therefore information about the “nature of” the allocation and is to be disclosed:

- Wildlife Management Unit (“WMU”)/area number
- species of animal
- manner (“class”) of hunting
- allocation identification number
- “exchange” (source) information
- which allocations any one person holds in each WMU, and total number of allocations any one person holds in each WMU (current status)
- starting season

b. How do you get and keep an allocation?

[para 81] Prior to 1997, a predecessor to the Public Body granted the allocations, including transfers of the allocations. The Minister determined the procedure for initially obtaining allocations (by application, auction, etc.), as set out in section 54(2) of the *Wildlife Regulation*. I find that information about the purchase date and about how allocations were obtained (application, auction, etc.) is information about the “nature of” the allocation. The latter information sometimes appears under the “Source” category in the records.

[para 82] As provided by section 55 of the *Wildlife Regulation*, allocations could be transferred if the Minister approved. I find that information about transfers, including the dates of transfer, is information about the “nature of” the allocation. This information sometimes appears under the “Source” category in the records.

[para 83] As is evident from the records, the Minister required an allocation transfer document to be filled out, signed and dated by both the transferor and transferee. That document is entitled “Application for Transfer of Non-Resident/Non-Resident Alien Licence Allocations”. There is a checkbox area regarding whether the allocation is being surrendered to the Minister with or without conditions. There is a further part of the document in which the transferee agrees that “...I am subject to the terms and conditions in respect of each allocation transferred to me.” I find that information about a transfer of an allocation, including information on the transfer form pertaining to dates of transfer and whether with or without conditions, is information about the “nature of” the allocation.

[para 84] Allocations have to be renewed yearly. I find that renewal information is information about the “nature of” the allocation. This information sometimes appears under the “Source” category in the records.

[para 85] Paragraph 11 of the affidavit says:

11. Generally, allocations are granted for a five-year period. In 1998, existing allocations were “rolled over” for a further five years to the allocation holders at that time. All allocations are to be reviewed in 2002. It is unknown at this time what changes there may be to the existing allocation process.

[para 86] I find that information about the years in which allocations are held is information about the “nature of” the allocation.

[para 87] Paragraph 13 of the affidavit says:

13. During the time of administration of the program by SRD and its predecessors, outfitters were required to designate an allocation on which they intended to take a hunter as either primary (“P”) or secondary (“S”). This designation was instituted for a time, to prevent outfitters from holding large numbers of allocations, with no intention or ability to use them. The designation of secondary was used if an outfitter intended to take one hunter to more than one area when hunting for the same species. If an allocation was not used as a “primary” for two consecutive years, the allocation reverted back to the government with no compensation to the outfitter. A reverted allocation could be resold to any outfitter, but its allocation number would be changed. The primary/secondary designation is no longer used, and there is no reversion of allocations for lack of use.

[para 88] I find that information about primary and secondary designations (usually set out in the “Status” category in the records), dates allocations were last used as primary, and information about whether an allocation reverted to the Crown, is information about the “nature of” the allocation.

[para 89] In 1997, APOS was delegated the authority for the distribution, including transfer, of allocations: see section 2(2)(b) of Schedule 3 of the *Wildlife Regulation*. All terms and conditions of allocations issued before the commencement of the section and still subsisting are to be administered and maintained by APOS: see section 12 of Schedule 3 of the *Wildlife Regulation*.

[para 90] As set out in section 10(d) of Schedule 3 of the *Wildlife Regulation*, APOS also has the authority to determine the manner in which allocations are to be distributed and transferred. APOS requires the same “Application for Transfer of Non-Resident/Non-Resident Alien Licence Allocations” form to be completed. I find that the information from the form, albeit now obtained by APOS, is still information about the “nature of” the allocation as I have discussed above.

[para 91] APOS also requires a “Confirmation of Allocation Lease Agreement” form to be completed for leases of allocations. I find that the date of the lease is information about the “nature of” the allocation.

[para 92] In summary, the following is information about how you get and keep an allocation. It is therefore information about the “nature of” the allocation and is to be disclosed:

- Purchase date
- How allocations are obtained (source)
- Transfer of allocations (source)
- Dates of transfers
- Allocation transfer document (dates of transfer, checkbox information)
- Years in which allocations are held
- Primary and secondary designations (status)
- Dates last used as primary
- Reversions to the Crown
- Allocation lease agreement (date of lease)

c. What do you pay for an allocation?

[para 93] Section 24(3) of the *Wildlife Regulation* provides that the fees payable for allocations are those set out in Part 5 of Schedule 8 of the *Wildlife Regulation*.

[para 94] The fees payable annually for the renewal of allocations obtained pursuant to section 54(2) of the *Wildlife Regulation* are set out in section 5 of Part 5 of Schedule 8 of the *Wildlife Regulation*.

[para 95] On page 11 of its main submission, the Public Body says that the fee amount for each set of area allocations is specific to the allocation and remains the same, regardless of which outfitter holds the allocation.

[para 96] Paragraph 6 of the affidavit says that the annual renewal fee was instituted in 1993. Prior to 1997, the fees were payable to the predecessors of the Public Body. Since 1997, the fees have been payable to APOS. APOS has the authority to collect the fee under section 2(2)(d) of Schedule 3 of the *Wildlife Regulation*. I find that the annual renewal fee is information about the “nature of” the allocation.

[para 97] Paragraph 9 of the affidavit says that there was no transfer fee prior to 1997. After 1997, APOS instituted a transfer fee for the transfer of allocations between outfitters. I find that the transfer fees are information about the “nature of” the allocation.

[para 98] In summary, the following is information about what you pay for an allocation. It is therefore information about the “nature of” the allocation and is to be disclosed:

- Annual renewal fees, GST and total such fees for specific allocations
- Transfer fees and total transfer fees for specific allocations

[para 99] I find that the records do not contain any information about the consideration paid for guiding. In paragraph 10 of the affidavit, APOS says that at no time has the Public Body, its predecessors or APOS been involved in the consideration exchanged between the outfitters in the transfers.

4. Conclusion under section 17(2)(g) [previously section 16(2)(g)]

[para 100] The responsive information in the records is information about a licence, permit or other similar discretionary benefit (namely, the allocations and the transfer of allocations) relating to a commercial activity, that a public body granted to the Third Parties and to other third parties. Consequently, it would not be an unreasonable invasion to disclose the Third Parties' names and other third parties' names (whether printed names or signatures), as well as the nature of the licence, permit or other similar discretionary benefit, as I have set out in this Order.

[para 101] The Public Body is authorized to disclose the information to which I have found that section 17(2)(g) [previously section 16(2)(g)] applies. Most of the information to be disclosed is the information the Public Body had previously decided to disclose. I intend to order the Public Body to disclose that information to the Applicant.

[para 102] However, there is some other information the Public Body withheld that also meets the criteria of section 17(2)(g) [previously section 16(2)(g)]. I intend to order the Public Body to disclose that additional information to the Applicant. Along with this Order, I will provide the Public Body with a copy of the records, highlighting the additional information the Public Body is to disclose. To be clear, that highlighted information to be disclosed is in addition to the information the Public Body had previously decided to disclose.

[para 103] The Applicant and APOS (in paragraph 15 of the affidavit) both provided evidence about APOS's practice of routinely and publicly providing a summary of allocations held by each outfitter. That disclosure is authorized by section 17(2)(g) [previously section 16(2)(g)].

ISSUE C: If section 17(2)(g) [previously section 16(2)(g)] does not apply to the information or records, does section 17 [previously section 16] of the FOIP Act (personal information) apply to the information or records?

[para 104] Given my findings concerning non-responsive information, and the application of section 17(2)(g) [previously section 16(2)(g)] to the other information, there is no information remaining to be considered under section 17 [previously section 16].

ISSUE D: Alternatively, does section 16 [previously section 15] of the FOIP Act (business interests) apply to the information or records?

[para 105] Section 16(1) [previously section 15(1)] reads:

16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body, when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 106] For section 16(1) [previously section 15(1)] to apply, it must be established that:

1. Disclosure of the information would reveal commercial or financial information of a third party (section 16(1)(a) [previously section 15(1)(a)] – the other kinds of information are not relevant here),
2. The information was supplied, explicitly or implicitly, in confidence (section 16(1)(b) [previously section 15(1)(b)]), and
3. Disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 16(1)(c) [previously section 15(1)(c)].

[para 107] The Public Body decided to disclose certain information, although its decision to disclose was not made under section 16(1) [previously section 15(1)]. Therefore, section 71(3)(b) [previously section 67(3)(b)] of the FOIP Act places the burden on the Third Parties to prove that section 16(1) [previously section 15(1)] applies to prevent disclosure of the information.

[para 108] The Third Parties did not provide any evidence for the inquiry. I have only the comments the Public Body received from the Third Parties prior to the Public Body's giving notice under section 31 [previously section 30] of the FOIP Act of its intention to disclose certain information. Even then, the Third Parties for Review Number 2205 and Review Number 2235 did not make any arguments under section 16 [previously section 15]. Only the Third Party for Review Number 2207 and Review Number 2366 made general statements that could be considered to be arguments under section 16(1) [previously section 15(1)].

[para 109] Since section 16(1) [previously section 15(1)] is a mandatory exception to disclosure, I find it necessary to consider whether there is anything on the face of the records to support the application of section 16(1) [previously section 15(1)].

1. Would disclosure of the information reveal commercial or financial information of a third party (section 16(1)(a) [previously section 15(1)(a)])?

[para 110] As set out previously in this Order, "commercial information" is information related to the buying, selling or exchange of merchandise or services.

[para 111] The Public Body submits that only the information directly related to the renewal and transfer of the allocations could be considered to be commercial information. However, the Public Body argues that the commercial information is not that of the Third Parties.

[para 112] The Public Body says that section 16(1)(a) [previously section 15(1)(a)] is intended to protect information that is original or proprietary to a third party, and that may be viewed objectively as "belonging" to the third party. As the information arises in the context of the administration of a benefit program specifically contemplated in legislation, the Public Body says that the information belongs to the Public Body, who has the mandate and requirement to deliver and maintain the program. The Public Body maintains that the information is linked to the allocation, not the outfitter.

[para 113] An allocation is needed to conduct a commercial activity, but there is nothing in the renewal and transfer of allocations that is information about the commercial activity of the particular outfitter-guide.

[para 114] I agree with the Public Body's assessment that information related to the renewal and transfer of the allocations is not the commercial information of the Third Parties and would not reveal the commercial information of the Third Parties.

[para 115] The only information that I would be prepared to find is or would reveal commercial information of the Third Parties is information that relates to the number of allocations held by each Third Party, the primary and secondary status of the allocations, and when allocations were last used as primary. None of the other information that the Public Body decided to disclose is commercial information of the Third Parties, nor would it reveal commercial information of the Third Parties.

[para 116] One of the Third Parties argues that disclosure of information about the allocations could be used to figure out how much money he made using the allocations. I take this to be an argument that disclosure would reveal financial information of that Third Party. The Third Party's example presumes that there is a "going rate" charged for guiding each particular hunter, and that everybody knows the "going rate". I do not accept that argument. I find that the records do not contain nor would they reveal information about the consideration paid for guiding, which would be the financial information of the Third Parties.

[para 117] The only financial information in the records pertains to the fees charged for yearly renewal of allocations and transfers of allocations. However, that is information of the Public Body. It is not the financial information of the Third Parties, nor would it reveal the financial information of the Third Parties.

2. Was the information supplied, explicitly or implicitly, in confidence (section 16(1)(b) [previously section 15(1)(b)])?

[para 118] The Public Body says that, since the information is that of the Public Body, the Third Parties did not supply it to the Public Body.

[para 119] I find that the Third Parties did not supply most of the responsive information to the Public Body, as the Public Body had that information as a result of the allocation process. In particular, I find that the Third Parties did not supply to the Public Body information about the number of allocations held. Therefore, section 16(1) [previously section 15(1)] does not apply to the information, particularly the information about the number of allocations.

[para 120] The Third Parties supplied to the Public Body the information about the primary and secondary status of the allocations, and when allocations were last used as primary. However, there is no evidence that the information was supplied explicitly in confidence. The information was also not supplied implicitly in confidence, that is, there was not an expectation or understanding of confidentiality, (see, for example, Order 2000-014), as the information was not:

- (i) Communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
- (ii) Treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;

- (iii) Not otherwise disclosed or available from sources to which the public has access; or
- (iv) Prepared for a purpose, which would not entail disclosure.

[para 121] The Public Body says there was no reasonable expectation of confidence, since the information relates to the administration of allocations for guiding for the purpose of hunting wildlife, which is a public resource. I agree. I find that the information was not supplied, explicitly or implicitly, in confidence. Therefore, section 16(1) [previously section 15(1)] does not apply to the information.

3. Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c) [previously section 15(1)(c)]?

[para 122] Given the foregoing decision, it is not necessary for me to consider section 16(1)(c) [previously section 15(1)(c)]. Furthermore, there is no evidence from two of the Third Parties.

[para 123] The remaining Third Party argues that disclosure of the location of the allocations he holds may give a neighbouring allocation holder a negotiating advantage if the Third Party seeks to buy an allocation from that person. However, that is speculative, and is not evidence that disclosure could reasonably be expected to bring about the harm.

[para 124] The Third Party also argues financial loss to his family and employees, but does not provide any evidence. Therefore, I will not consider that argument any further.

4. Conclusion under section 16 [previously section 15]

[para 125] I find that section 16(1) [previously section 15(1)] does not apply to the information or records. Therefore, the Public Body is not required to withhold the information or records under section 16(1) [previously section 15(1)].

5. If section 16(1) were to apply to the information or records, does section 16(3)(b) apply?

[para 126] Since section 16(1) does not apply, I do not find it necessary to consider section 16(3)(b).

V. ORDER

[para 127] I make the following Order under section 72 [previously section 68] of the FOIP Act.

Preliminary matter

[para 128] Except for the information set out in Appendix B to this Order, the Public Body properly removed from the records the information the Public Body highlighted as being non-responsive. That non-responsive information is information about allocations unrelated to the Applicant's access request or information to which the Applicant did not request access. The Public Body has the authority to remove that non-responsive information from the records. I have not considered that information under section 16 [previously section 15] or section 17 [previously section 16].

[para 129] The information set out in Appendix A to this Order is also non-responsive because it is information to which the Applicant did not request access. The Public Body has the authority to remove that non-responsive information from the records. I have not considered that information under section 16 [previously section 15] or section 17 [previously section 16].

[para 130] The information set out in Appendix B to this Order, which is information the Public Body said is non-responsive, is in fact responsive to the Applicant's access request. The Public Body does not have the authority to remove that responsive information from the records. I have considered that information under section 16 [previously section 15] and section 17 [previously section 16].

[para 131] Along with this Order, I have provided the Public Body with a copy of the records, highlighting the non-responsive information set out in Appendix A and the responsive information set out in Appendix B.

A. Custody or control of the records held by APOS

[para 132] The records held by APOS are under the control of the Public Body. Therefore, the FOIP Act applies to those records.

B. Application of section 17(2)(g) [previously section 16(2)(g)] (licence, permit or other similar discretionary benefit)

[para 133] The responsive information in the records is information about a licence, permit or other similar discretionary benefit (namely, the allocations and the transfer of allocations) relating to a commercial activity, that a public body granted to the Third Parties and to other third parties. Consequently, it would not be an unreasonable invasion to disclose the Third Parties' names and other third parties' names (whether printed names or signatures), as well as the nature of the licence, permit or other similar discretionary benefit, as I have set out in this Order.

[para 134] The Public Body is authorized to disclose the information to which I have found that section 17(2)(g) [previously section 16(2)(g)] applies. Most of the information to be disclosed is the information the Public Body had previously decided to disclose. I order the Public Body to disclose that information to the Applicant.

[para 135] However, there is some other information the Public Body withheld that also meets the criteria of section 17(2)(g) [previously section 16(2)(g)]. I order the Public Body to disclose that additional information to the Applicant. Along with this Order, I have provided the Public Body with a copy of the records, highlighting the additional information the Public Body is to disclose. To be clear, that highlighted information to be disclosed is in addition to the information the Public Body had previously decided to disclose.

[para 136] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

C. Application of section 17 [previously section 16] (personal information)

[para 137] Given my findings concerning non-responsive information, and the application of section 17(2)(g) [previously section 16(2)(g)] to the other information, there is no information remaining to be considered under section 17 [previously section 16].

D. Application of section 16 [previously section 15] (business interests)

[para 138] Section 16(1) [previously section 15(1)] does not apply to the information or records. Therefore, the Public Body is not required to withhold the information or records under section 16(1) [previously section 15(1)].

Dave Bell
Adjudicator

Appendix A to Order F2002-011

I find that the following information is non-responsive because it is information to which the Applicant did not request access:

Review Number 2205, pages 15, 35, 38: total annual use fees and total fees due.
Review Number 2205, pages 37 and 40: total allocations.

Review Number 2207, pages 4, 13, 17, 21, 26, 47, 59, 64, 96, 103, 110, 117: total annual use fees, total fees due, and total amounts.
Review Number 2207, pages 7, 12, 25, 30, 46, 51, 63 and 68: total allocations.
Review Number 2207, pages 18, 19, and 20: clients' names and wildlife identification numbers.
Review Number 2207, page 45: credit card information.

Review Number 2235, pages 41, 43, 55, 56, 57, 78, 80, 82, 85: total annual use fees, total fees due, and total amounts.
Review Number 2235, pages 54 and 58: total allocations.

Review Number 2366, pages 17, 19, 20, 25, 26, 32, 33, 39, 40, 41, 43, 46, 50 and 53: total allocations.

Appendix B to Order F2002-011

I find that the following information the Public Body said is non-responsive is in fact responsive to the Applicant's access request:

Review Number 2205, pages 35 and 38: number and amount for WMU 152.

Review Number 2207, pages 13, 47, 59 and 64: number and amount for WMU 354.
Review Number 2207, pages 13, 17, 21 and 26: number and amount for WMU 521.

Review Number 2235, pages 41, 43, 55, 56 and 57: number and amount for WMU 152.

Review Number 2366, page 7: number for WMU 537.

The foregoing information is responsive because it specifically includes the responsive information the Applicant requested for those allocations. As those numbers and amounts also include non-responsive information (that is, information about allocations other than those the Applicant requested), I must decide whether the FOIP Act allows or prevents disclosure of the responsive information.

I find that the following information is also responsive:

Review Number 2366, page 40: allocation type, allocation number, year and "from outfitter" columns for WMU 248 (allocation numbers 2234-2237 – four entries).

Review Number 2366, page 43: allocation type, allocation number, year and "from outfitter" columns for WMU 534 (allocation numbers 6166-6125) under the name "S.O." [names are abbreviated in this Appendix], and the name "S.O."

Review Number 2366, page 44: allocation type, allocation number, year and "from outfitter" columns for WMU 536 (allocation numbers 1398-1401) under the name "T.C.", and the name "T.C."

Review Number 2366, page 46: allocation type, allocation number, year and "from outfitter" columns for WMU 536 (allocation numbers 1378-1397) under the name "J.W.", and the name "J.W."

Presumably, the Public Body treated the foregoing information as non-responsive because the "footers" on those pages contain a date after the Applicant's March 13, 2001 access request. However, the year specified for those allocations is 2001. The Public Body has treated as responsive other 2001 information about allocations: see Review Number 2207, page 111 and Review Number 2235, page 83, for example. Therefore, I intend to take the broad rather than the narrow view and treat as responsive the foregoing 2001 information about allocations.